IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 3574 of 2004
with
SPECIAL CIVIL APPLICATION No 1512 of 2004

For Approval and Signature:

HON'BLE MR.JUSTICE R.K.ABICHANDANI Sd/-
and
HON'BLE MR.JUSTICE D.H.WAGHELA Sd/-

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

1 & 2 YES; 3 to 5 NO

UNION OF INDIA

Versus

N R PARMAR

Appearance:

1. Special Civil Application No. 3574 of 2004
MS MAUNA M BHATT Advocate for MR MANISH R BHATT
Advocate for Petitioner No. 1-3
MR SHALIN N MEHTA Advocate for Respondent No. 1-9

2. Special Civil Application No. 1512 of 2004
MR BHASKAR P TANNA Senior Advocate with
MR NIKHIL K KARIEL Advocate for Petitioners
MS MAUNA M BHATT Advocate for Respondents No.1-3
MR SHALIN N MEHTA Advocate for Respondent No.4-13

CORAM : HON'BLE MR.JUSTICE R.K.ABICHANDANI
and
HON'BLE MR.JUSTICE D.H.WAGHELA

Date of decision: 17/08/2004

C.A.V. JUDGEMENT

(Per : HON'BLE MR.JUSTICE D.H.WAGHELA for the Court)

1. The judgment of the Central Administrative Tribunal, Ahmedabad Bench ('CAT' for short) in O.A. Nos.92 of 2003 and 123 of 2003 is under challenge in both the petitions. The first-mentioned petition is filed by the Union of India through the Chairman, Central Board of Direct Taxes, the Secretary of Ministry of Finance and the Chief Commissioner of Income-tax, Ahmedabad; whereas the second petition is filed by five direct recruit inspectors working in the income-tax department. The matters have been finally heard at great length at the admission stage itself at the behest of the parties.

2. By the impugned judgment, the CAT has, in the applications made by a direct recruit Income-Tax Inspector ('ITI' for short) and several promotee ITIs, quashed the seniority list dated 25.3.2003 of ITIs of Gujarat Region and directed the department not to disturb the seniority already assigned to the ITIs in the seniority lists published in 1996 and 2000. In short, in this triangular lis among the direct recruits (DRs), the departmental promotees (DPs) and the Income-Tax Department, the central issue is whether, complying with the quota and rota rules, seniority of the DRs should be reckoned on the basis of the year in which the vacancies arose, or the year in which the selection process was initiated, or the year in which the candidates were selected, or the year in which they were actually appointed.

3. It appears that the very same issue was agitated before the Principal Bench of the Tribunal in O.A. No.2307 of 1999 and others, in which, by the decision dated 23.2.2000, it was held by the Tribunal that direct recruits are entitled to seniority from the date of their

selection by the Staff Selection Commission (SSC) and not from the date of their appointment. When that decision was challenged before the Delhi High Court in C.W.P. No.4604 of 2000 and others, it was set aside and the matter was remitted back to the Tribunal for consideration afresh in view of the advice and clarification issued by the Department of Personnel and

Training (DOPT). It was stated at the Bar that the original application so remanded was subsequently withdrawn.

4. It clearly appears from the record and there was a broad consensus that there are recruitment rules called "The Income-tax (Inspector) Recruitment Rules providing for quota in the ratio of 33.33% for direct recruits and 66.67% for departmental promotees and that, there are Office Memoranda and Circular dated 22.12.1959, 7.2.1986 and 3.7.1986 which govern the seniority of DRs and DPs and resolution of the dispute depends upon their correct interpretation and proper application. On the factual aspect, it is the stand of the department that in making the latest seniority list of 2003, seniority of promotees was fixed according to the vacancy year for which the D.P.C. was conducted and seniority of DRs was fixed according to the vacancy year for which intimation was sent to the SSC and the dossier was received consequently. And, no person is promoted to the post of ITI in excess of the quota for promotees, according to the Department.

4.1 The Ministry of Home Affair's circular dated 22.12.1959 laid down the general principles for determining seniority in the Central Services and provided in Para 6 for relative seniority of direct recruits and promotees in the following terms:

"6. Relative seniority of Direct Recruits and Promotees-

The relative seniority of direct recruits and of promotees shall be determined according to the rotation of vacancies between direct recruits and promotees which shall be based on the quotas of vacancies reserved for direct recruitment and promotion respectively in the Recruitment Rules."

An explanatory memorandum was also enclosed with the said circular and the general principle 6 thereof reads as under:

"General Principle 6.- A roster should be maintained based on the reservation for direct recruitment and promotion in the Recruitment Rules. Where the reservation for each method is

50%, the roster will run as follows: (1) Promotion, (2) Direct Recruitment, (3) Promotion, (4) Direct Recruitment and so on. Appointments should be made in accordance with this roster and seniority determined accordingly.

Illustration: Where 75% of the vacancies are reserved for promotion and 25% for direct recruitment, each direct recruit shall be ranked in seniority below 3 promotees. Where the quotas are 50% each, every direct recruit shall be ranked below a promotee. If for any reason a direct recruit or a promotee ceases to hold the appointment in the grade, the seniority list shall not be rearranged merely for the purpose of ensuring the proportion referred to above."

4.2 It appears that pursuant to several decisions of various High Courts and the Apex Court, a circular dated 7.2.1986 was issued of which relevant and important para 2 reads as under:-

"2. While the above mentioned principle was working satisfactorily in cases where direct recruitment and promotion kept pace with each other and recruitment could also be made to the full extent of the quotas as prescribed, in cases where there was delay in direct recruitment or promotion, or where enough number of direct recruits or promotees did not become available, there was difficulty in determining seniority. In such cases, the practice followed at present is that the slots meant for direct recruits or promotees, which could not be filled up, were left vacant, and when direct recruits or promotees became available through later examinations or selections, such persons occupied the vacant slots, thereby became senior to persons who were already working in the grade on regular basis. In some cases, where there was shortfall in direct recruitment in two or more consecutive years, this resulted in direct recruits of later years taking seniority over some of the promotees with fairly long years of regular service already to their credit. This matter had also come up for consideration in various Court cases both before the High Courts and the Supreme Court and in several cases the relevant judgment had brought out the inappropriateness of direct recruits of later

years becoming senior to promotees with long years of service." (emphasis added).

Para 7 of the Circular was as under:-

"7. These orders shall take effect from 1st March, 1986. Seniority already determined in accordance with the existing principles on the date of issue of these orders will not be reopened. In respect of vacancies for which recruitment action has already been taken, on the date of issue of these orders either by way of direct recruitment or promotion, seniority will continue to be determined in accordance with the principles in force prior to the issue of this OM."

4.3 The above guidelines were further explained by the Office Memorandum dated 3.7.1986 of DOPT addressed to all departments of the Government of India, the text of which reads as under:

"OFFICE MEMORANDUM
Dated 3.7.86.

Subject: SENIORITY - Consolidated orders on

The undersigned is directed to say that instructions have been issued by this Department from time to time laying down the principles for determining seniority of persons appointed to services and posts under the Central Government. For facility of reference, the important orders on the subject have been consolidated in this Office Memorandum. The number and date of the original communication has been quoted so that the users may refer to it to understand fully the context in which the order in question was issued.

SENIORITY OF DIRECT RECRUITS AND PROMOTEES
(MHA OM NO.9/11/55-RPS DT. 22.12.59)

2.1 The relative seniority of all direct recruits is determined by the order of merit in

which they are selected for such appointment on the recommendations of the U.P.S.C. or other selecting authority, persons appointed as a result of an earlier selection being senior to those appointed as a result of a subsequent selection.

2.2 Where promotions are made on the basis of selection by a D.P.C., the seniority of such promotees shall be in the order in which they are recommended for such promotion by the Committee. Where promotions are made on the basis of seniority subject to the rejection of the unfit, the seniority of persons considered fit for promotion at the same time shall be the same as the relative seniority in the lower grade from which they are promoted. Where, however, a person is considered as unfit for promotion and is superseded by a junior such persons shall not, if he is subsequently found suitable and promoted, take seniority in the higher grade over the junior persons who had superseded him.

2.3 Where persons recruited or promoted initially on a temporary basis are confirmed subsequently in an order different from the order of merit indicated at the time of their appointment, seniority shall follow the order of confirmation and not the original order of merit.

2.4.1 The relative seniority of direct recruits and of promotees shall be determined according to the rotation of vacancies between direct recruits and promotees which shall be based on the quota of vacancies reserved for direct recruitment and promotion respectively in the Recruitment Rules.

(DPT OM No.3510/2/80-Estt.(D) dt. 7.2.86)

2.4.2 If adequate number of direct recruits do not become available in any particular year, rotation of quotas for the purpose of determining seniority would take place only to the extent of the available direct recruits and the promotees.

In other words, to the extent direct recruits are not available the promotees will be bunched together at the bottom of the seniority list below the last position upto which it is possible to determine seniority, on the basis of rotation of quotas with reference to the actual number of

direct recruits who become available. The unfilled direct recruitment quota vacancies would, however, be carried forward and added to the corresponding direct recruitment vacancies of the next year (and to subsequent years where necessary) for taking action for direct recruitment for the total number according to the usual practice. Thereafter in that year while seniority will be determined between direct recruits and promotees, to the extent of the number of vacancies for direct recruits and promotees as determined according to the quota for that year, the additional direct recruits selected against the carried forward vacancies of the previous year would be placed en-bloc below the last promotee (or direct recruit as the case may be), in the seniority list based on the rotation of vacancies for that year. The same principle holds good for determining seniority in the event of carry forward, if any, of direct recruitment or promotion quota vacancies (as the case may be) in the subsequent year.

(emphasis added)

ILLUSTRATION: Where the Recruitment provide 50% of the vacancies of a grade to be filled by promotion and the remaining 50% by direct recruitment, and assuming there are ten vacancies in the grade arising in each of the year 1986 and 1987 and that two vacancies intended for direct recruitment remain unfilled during 1986 and they could be filled during 1987, the seniority position of the promotees and direct recruits of these two years will be as under:

1986	1987
1. P1	9. P1
2. D1	10. D1
3. P2	11. P2
4. D2	12. D2
5. P3	13. P3
6. D3	14. D3
7. P4	15. P4
8. P5	16. D4
	17. P5
	18. D5
	19. D6
	20. D7

2.4.3 In order to help the appointing authorities in determining the number of

vacancies to be filled during a year under each of the methods of recruitment prescribed, a Vacancy Register giving a running account of the vacancies arising and being filled from year to year may be maintained in the proforma enclosed.

2.4.4 With a view to curbing any tendency of under-reporting/suppressing the vacancies to be notified to the concerned authorities for direct recruitment, it is clarified that promotees will be treated as regular only to the extent to which direct recruitment vacancies are reported to the recruiting authorities on the basis of the quotas prescribed in the relevant recruitment rules. Excess promotees, if any, exceeding the share falling to the promotion quota based on the corresponding figure, notified for direct recruitment would be treated only as ad-hoc promotees."

4.4 To complete the record as far as the relevant rules and instructions are concerned, it must be noted that by filing an affidavit on behalf of the respondents in Special Civil Application No.1512 of 2004, a very recent communication dated 11.5.2004 from the Ministry of Finance to the Chief Commissioner of Income-tax (CCA), Chandigarh has been placed on record; and it reads as under:

"Subject: Fixation of inter-se seniority of DR and Promotee Income Tax Inspectors in view of clarification given by DOP&T in r/o OM dated 3.7.1986.

Sir,

I am directed to refer to your letter F. No.CC/CHD/2003-04/935 dated 4.12.2003 on the above subject and to say that the matter has been examined in consultation with DOP&T and necessary clarification in the matter is given as under:

Point/querry raised:
Whether direct recruit Inspectors should be given seniority of year in which selection process initiated or vacancy occurred or otherwise.

Clarification:

It is clarified by DOP&T that Direct Recruits' seniority vis-a-vis the promotees is reckoned from the year in which they are actually recruited. DRs cannot claim seniority of the year in which the vacancies had arisen. The question of grant of seniority to DRs of the period when they were not even in service does not arise.

3. Representations may please be disposed of accordingly.

Sd/-
Under Secretary to the Government of India"
(emphasis added)

5. With the above backdrop of facts and the applicable norms declared in the OMs and Circulars, it was submitted by the learned counsel Ms.Mauna Bhatt, appearing for the petitioner-authorities of the department, that the final seniority list dated 25.3.2003 for the cadre of ITIs for Gujarat Region was based on the Office Memorandum dated 3.7.1986 and the guidelines issued by the DOPT which are binding upon all Central Government departments. It was argued that the department could not have ignored the DOPT's advice dated 2.2.2000, according to which, "....if action was initiated during the Recruitment Year 1986-87 even if it culminates in the joining by the selected candidates only in 1990, they will get seniority of 1986-87. This applies equally to DRs as well as promotees. In other words, if such DRs of 1986-87 ultimately join in 1990 yet they will be rotated with promotees of 1986-87." (As noted in para 10 of the impugned judgment, the above advice was given during pendency of the original application before the Principal Bench.)

5.1 It was also submitted that since there were two sources of recruitment for the posts of ITIs and quota was prescribed by the Recruitment Rules, rota in assigning inter-se seniority has to be applied in such a way that quota rule is not violated. Although originally the date of entry determined seniority position till the seniority lists of 1986 and 2000 were made, the aforesaid advice had to be given effect to in making of the revised seniority list dated 25.3.2003.

5.2 The learned counsel relied upon the judgment of the Supreme Court in DIRECT RECRUIT CLASS II ENGG.

OFFICERS' ASSOCIATION v. STATE OF MAHARASHTRA [AIR 1990 SC 1607] in support of the submission that on account of restructuring in 1993 and 2000, promotions were given by relaxation of recruitment rules, but quota must be followed strictly. It was pointed out from the judgment that "the decision dealing with important questions concerning a particular service given after careful consideration should be respected rather than scrutinized for finding out any possibility of error". However, a relevant proposition from amongst the propositions laid down in para 44 (A) to (K) of the said judgment, proposition (E) reads as under:-

> "(E) where the quota rule has been broken down and the appointments are made from one source in excess of the quota, but are made after following the procedure prescribed by the rules for the appointment, the appointees should not be pushed down below the appointees from the other source inducted in the service at a later date."

5.3 KESHAV CHANDRA JOSHI & OTHERS v. UNION OF INDIA [AIR 1991 SC 284] was relied upon for the proposition that the rules, legislative in character, must harmoniously be interpreted as a connected whole giving life and force to each word, phrase and rule and no part thereof should be rendered nugatory, and that where the appointment was made on a stop-gap arrangement, the period of officiation in such post cannot be taken into account for reckoning seniority.

5.4 Relying upon the judgment in A.K.NIGAM v. SUNIL MISHRA [1994 Supp. (2) SCC 245], it was submitted that it is not an invariable rule that seniority has to be determined only on the basis of the respective date of appointment to the post and any departure therefrom would be unreasonable and illegal.

6. The learned Senior Advocate Mr.B.P.Tanna, appearing for the DRs, who are the petitioners in SCA No.1512 of 2004, argued that proper places were not assigned to the DRs even in the seniority lists of 1996 or 2000. He submitted that the impugned judgment of the CAT was obtained without joining as respondents the DRs who were likely to be affected by quashing of the seniority list of 2003 and, therefore, it was required to be set aside as being in violation of the principles of natural justice. It was also contended, without it being supported by any material on record, that promotees were

far in excess of their quota in the cadre and such promotees were required to be considered as ad-hoc and pushed down to the year in which they could find their place in the quota.

6.1 The learned counsel sought to distinguish the ratio of the judgment of the Supreme Court in SURAJ PRAKASH GUPTA & OTHERS v. STATE OF JAMMU & KASHMIR & OTHERS [AIR 2000 SC 2386] on the basis that there were, in the facts of that case, specific rules regarding recruitment, retrospective regularisation and seniority. Relying upon the ratio of the judgment in SWAPAN KUMAR PAL & OTHERS v. SAMITABHAR CHAKRABORTY & OTHERS [AIR 2001 SC 2353], it was submitted that, if the recruitment rules applicable in a particular case were different, the conclusion would also be different. He also sought to distinguish the judgment of the Supreme Court in JAGDISH CHANDRA PATNAIK v. STATE OF ORISSA [(1998) 4 SCC 456] on the grounds that specific words and provisions of Rule 26 were interpreted and applied in that case. The learned counsel relied upon a recent judgment of the Supreme Court in K.V.N.ACHARYULU & ORS. v. A.P.STATE ROAD TRANSPORT CORPORATION [AIR 2004 SC 3517] in which the promotees who had been pushed down in the seniority list below the direct recruits had approached the Supreme Court. That petition, however, appears to have been rejected by majority relying upon the express regulation under which the promotees were liable to be reverted as and when approved direct recruits became available and replaced the promotees.

7. Mr.R.C.Yadav, the respondent No.13 in SCA No.1512 of 2004 and who was the applicant in O.A. No.92 of 2002 before the CAT, also submitted as party-in-person, that the department had consistently filled up the posts of income-tax inspectors by promotees in far excess of their quota and in total breach of the Recruitment Rules and suppressed the vacancies meant for DRs. It was, on that basis and relying upon SURAJ PRAKASH GUPTA & OTHERS (supra), submitted that excess promotees occupying vacancies meant for direct recruits have to be pushed down and adjusted in later vacancies within their quota after due regularisation. He argued that the DRs appointed against their quota are necessarily to be rotated against DPs promoted during the year in which the vacancies for DRs arose and not in the subsequent years when the DRs actually came to be appointed. It must, however, be noted here that the factual allegation of DPs having been promoted in excess of their quota was not substantiated and the finding to that effect recorded in para 63 of the impugned judgment is not challenged by

him.

8. The learned counsel Mr.Shalin Mehta, representing the promotees-respondents, submitted that the office memorandum dated 22.2.1959 permitted assignment of seniority from the date the vacancy arose which, however, came to be modified by the circular dated 7.2.1986 in view of a string of judgments of the Apex Court which highlighted the impropriety of DRs of later years becoming senior to the promotees with long years of service. Therefore, a course of correction was commenced with effect from 1.3.1986 as ordained by the aforesaid circular. He submitted that the circular dated 3.7.1986 restricted the rotation of quotas for the purpose of determining seniority only to the extent of the available direct recruits and departmental promotees during the relevant year. He also submitted that the advice dated 2.2.2000 of the DOPT injecting into consideration of seniority, the element of process of recruitment was illegal and contrary to the principles laid down by the Supreme Court besides being one issued during the pendency of the original applications before the Principle Bench of the CAT. He further submitted that the circular or advice dated 2.2.2000 was also inconsistent with the circulars dated 7.2.1986 and 3.7.1986. He argued that the phrase "available direct recruits" occurring in para 2.4.2 of the circular dated 3.7.1986 only meant DRs who are actually appointed in any particular year, and, initiation of process of recruitment or selection for the post was far from actual appointment in the cadre. Even after selection of a candidate by the SSC, there were four stages and steps to

be taken before he could be actually appointed or recruited on the post of ITI, according to his submission.

8.1 The learned counsel Mr.Mehta further submitted that the seniority lists of 1996 and 2000 were not only finalized after inviting and considering objections but they were acted upon and promotions to all India cadre of income-tax officers were made on that basis. The seniority assigned to the promotees on the basis of the lists could not have been disturbed and the settled position could not have been unsettled after seven years by reopening the question of seniority as was sought to be done by revising the seniority list in 2003. He pointed out from an affidavit filed on behalf of the department itself in a different and separate proceeding,

being O.A. No.251 of 2002, that the following averments were made by the Additional Commissioner of Income Tax (HQ-P&A):

"Therefore, in view of the above settled law position, if the case of the petitioner is allowed, it will result in acute administrative difficulties and unsettle a settled position, that too, will have a cumulative effect and will disturb the seniority in the cadre of income-tax officers, which is maintained at all India level as against the seniority of income-tax inspectors being maintained region-wise viz. Gujarat Region in the instant case."

8.2 The learned counsel Mr.Mehta relied upon the judgment of the Supreme Court in N.K.CHAUHAN & OTHERS v. STATE OF GUJARAT & OTHERS [(1977) 1 SCC 308] wherein direct recruitments were not made for three years but many promotions were effected and it was held as under:-

"32. We, therefore, reach the following conclusions:-

1. xxx xxx xxx

2. xxx xxx xxx

3. The quota rule does not, inevitably, invoke the application of the rota rule. The impact of this position is that if sufficient number of direct recruits have not been forthcoming in the years since 1960 to fill in the ratio due to them and those deficient vacancies have been filled up by promotees, later direct recruits cannot claim "deemed" dates of appointment for seniority in service with effect from the time, according to the rota or turn, the direct recruits' vacancy arose. Seniority will depend on the length of continuous officiating service and cannot be upset by later arrivals from the open market save to the extent to which any excess promotees may have to be pushed down as indicated earlier."

The Supreme Court has also, referring to the

judgment in MERVYN COUTINDO v. COLLECTOR OF CUSTOMS, BOMBAY [AIR 1967 SC 52], observed that:

> "....The inextricable interlinking between quota and rota springs from the specific provision rather than by way of any general proposition."

8.3 Relying upon the judgment in JAGDISH CHANDRA PATNAIK v. STATE OF ORISSA [AIR 1998 SC 1926], it was submitted that the argument that the expression "recruited" meant as a stage earlier to the appointment was not accepted by the Supreme Court and it was held that until final selection was made and appropriate orders passed thereon, no person could be said to have been recruited to the service.

8.4 The decision of the Supreme Court in A.N.PATHAK v. SECRETARY TO THE GOVERNMENT, MINISTRY OF DEFENCE 1987 [(Supp) SCC 763], was cited for the proposition that delay in making appointments by direct recruitment should not visit the promotees with adverse consequences denying them the benefit of their service. From paragraphs 79 and 81 of the judgment in SURAJ PRAKASH GUPTA (supra), it was pointed out that only excess promotees occupying posts meant for the direct recruits have to be pushed down whereas seniority of direct recruits has to be from the date of substantive appointment and seniority has to be worked out between the direct recruits and promotees for each year. And that, in service jurisprudence, a direct recruit can claim seniority only from the date of his regular appointment and not from a date when he was not born in the service. He submitted that the earlier judgment in A.JANARDHANA v. UNION OF INDIA & OTHERS [(1983) 3 SCC 601] holding that a later direct recruit cannot claim seniority from a date before his birth in the service was referred and relied upon in SURAJ PRAKASH GUPTA (supra). He relied upon the following proposition from the decision of the Supreme Court in A.JANARDHANA (supra):

> "....If this has not a demoralising effect on service, we fail to see what other inequitous approach would be more damaging. It is, therefore, time to clearly initiate a proposition that a direct recruit who comes into service after the promotee was already unconditionally and without reservation promoted and whose promotion is not shown to be invalid or illegal

according to the relevant statutory or non-statutory rules should not be permitted by any principle of seniority to score a march over a promotee because that itself being arbitrary would be violative of Articles 14 and 16." (see paragraph 38)

The learned counsel relied upon the judgment of the Supreme Court in A.K.SUBRAMAN & OTHERS v. UNION OF INDIA & OTHERS [(1975) 1 SCC 319] for the following proposition:

".....If quota from one source cannot be filled unless the quota from other source was exhausted, it would introduce sterility in the quota rule. The hopes and aspirations of the promotees cannot be related to the availability or non-availability of the direct recruits to fill their quota. Therefore, each quota has to be worked independently on its own force and the prospects of promotees have to remain intact in the hierarchy of the service". (see paragraph 23).

9. As far as the second petition, i.e. Special Civil Application No.1512 of 2004 and the contention of the petitioner-direct recruits-that they were necessary and affected parties are concerned, it has to be noted that they are alleged to have had full knowledge about the proceedings pending before the CAT and even though one direct recruit had filed an application, being O.A. No.92 of 1993, challenging the same seniority list dated 25.3.2003, they had never attempted to joint the proceeding. It is alleged in the affidavit of the respondent No.4 that the pendency of O.A. No.123 of 2003 had received wide publicity and all the petitioners had knowledge about such petition, but they had been the "fence-sitters" all throughout the litigation. It is also alleged that the petitioners had never made any representation against the earlier seniority lists circulated in the years 1996 and 2000. These allegations are not denied by the petitioners in Special Civil Application No.1512 of 2004. Besides that, in the judgment of the Supreme Court, directly on the issue, in K. AJIT BABU v. UNION OF INDIA [AIR 1997 SC 3277] it was held as under;

"Often in service matters, the judgments rendered either by the Tribunal or by the Court also

> affect other persons who are not parties to the cases. It may help one class of employees and at the same time adversely affect another class of employees. In such circumstances, the judgments of the Courts or the Tribunals may not be strictly judgments in personam affecting only the parties to the cases, they would be judgments in rem. In such a situation, the question arises: what remedy is available to such affected persons who are not parties to a case, yet the decision in such a case adversely affect to their rights in the matter of their seniority.....The application filed by the appellant under Section 19 of the Act was dealt with in accordance with law.....Whenever an application under Section 19 of the Act is filed and the question involved in the said application stands concluded by some earlier decision of the Tribunal, the Tribunal necessarily has to take into account the judgment rendered in earlier case, as a precedent and decide the application accordingly. The Tribunal may either agree with the view taken in the earlier judgment or it may dissent. If it dissents, then the matter can be referred to a larger Bench/Full Bench and place the matter before the Chairman for constituting a larger Bench so that there may be no conflict upon the two Benches. The larger Bench then has to consider the correctness of earlier decision in disposing of the later application. The larger Bench can overrule the view taken in the earlier judgment and declare the law which would be binding on all the Benches."

Accordingly, it is not open to the petitioner-DRs to challenge in their petition, being Special Civil Application No.1512 of 2004, the decision of the Tribunal on the ground that they were not impleaded as parties and to plead that the matter should be remanded or the decision be set aside on that ground.

10. There was a clear consensus that the inter-se seniority of DPs and DRs was governed by the Office Memoranda and Instructions referred to in paragraph 4 hereinabove. In view of the clear finding in the impugned decision of the Tribunal and in absence of any material to the contrary, it is assumed that no ITI is a promotee in excess of the quota for promotees. Therefore, in view of the clear and consistent ratio of the decisions of the Supreme Court in N.K.CHAUHAN (supra)

and SURAJ PRAKASH GUPTA (supra), the question of pushing down any promotee in the seniority list will not arise in the context of the seniority list which does not include excess promotees.

10.1 The basic rule for relative seniority of direct recruits and promotees, as laid down in paragraph 2.4.1 in O.M.dated 22.12.1959, is that their vacancies are to be rotated on the basis of the quota reserved for direct recruitment and promotion. However, in case adequate number of direct recruits do not become available in any particular year, rotation of quotas for the purpose of determining seniority can take place only to the extent of the available direct recruits and promotees as clearly laid down by paragraph 2.4.2 in O.M. dated 7.2.1986. That provision is further clarified and illustrated to show that the unfilled direct recruit quota vacancies would be carried forward and added to the vacancies of the next year with the additional direct recruits selected against the carried forward vacancies being placed en-bloc below the last promotee in the seniority list based on the rotation of vacancies for that year. Thus, any claim for seniority in the year in which a vacancy had arisen but not filled up could not have been entertained. The clear mandate in paragraph 2.4.2 referred hereinabove to the effect that rotation of quotas would take place only to the extent of the available direct recruits and promotees is not susceptible to any other interpretation.

11. However, the argument vehemently canvassed on behalf of the Department and the direct recruits was that the phrase "if adequate number of direct recruits do not become available in any particular year" has to be understood and applied in such a manner that no injustice is caused to the direct recruits whose recruitment process usually takes more than one year as also to ensure that quota rule was not violated by consistent failure to fill up in time the vacancies arising for DRs. It was to meet with such a situation that the Department had issued the advice dated 2.2.2000, according to which, the year of initiation of action for recruitment was relevant for the purpose of reckoning seniority of the DRs. It was vehemently argued that the said advice was meant to strike a balance between the interests and further promotional prospects of the DPs and DRs whose actual appointment might have been delayed due to administrative reasons and without any fault on their part. And, to that extent, departure from the rule that seniority has to be determined only on the basis of the respective date of appointment to the post was reasonable

and legal as held by the Supreme Court in A.K.NIGAM (supra). It was also argued that while the departmental candidates for promotions would generally be available and can be easily promoted, the process of direct recruitment through SSC and the other necessary formalities always take a longer time resulting into delay in actual appointment of DRs.

12. Reading the expressions "direct recruits" and "do not become available in any particular year" in paragraph 2.4.2 in the context of the scheme provided for fixing seniority, it is clear that the DRs contemplated by the rule are those who are actually available for placement by rotation in the seniority list in a particular year. The candidates who are undergoing the process of recruitment cannot be said to be available for rotation of quotas till they are appointed. If later appointees against the quota of vacancies of an earlier year were to be considered for seniority in that earlier year, the clarification for carrying forward such vacancies and placing them in the seniority list en-bloc in the year of appointment would not have been required. Paragraph 2.4.4 of the O.M. dated 7.2.1986 takes care of the tendency of unreporting/suppressing the vacancies to be notified to the concerned authorities for DRs and provides for pushing down the excess promotees. It has no bearing on the promotees appointed against their own quota of the year concerned. Paragraph 2.4.2 read with its clarification and illustration clearly envisages giving of seniority to the DRs of the year of their actual appointment disregarding the year in which the recruitment process for DRs was initiated or completed. Realising the incongruity and injustice caused by the DRs stealing a march over regular promotees by being placed against a reserved slot in the earlier year and in tune with the catena of judgments on the issue, the memos and clarifications have been issued by the DOPT with illustrations to leave no room for doubt. Such just and clear scheme circulated for uniform application cannot be supplanted by any inter-office memo or so-called advice so as to revert to the confusion which was sought to be cleared by the O.M. dated 7.2.1986 and 3.7.1986.

13. There was no dispute about the proposition that seniority of the ITIs, maintained region-wise, was to be assigned on year-to-year basis and the year for that purpose was the financial year commencing on 1st of April. It was fairly conceded by the learned counsel Mr.Mehta, appearing for the promotees, that within a year for which inter-se seniority was to be assigned among DRs and DPs, rota rule has to be applied to the DRs who are

actually appointed in the particular year, disregarding to that extent the actual date of promotion of the promotees which may be earlier during that year.

14. In the facts and for the reasons discussed hereinabove, subject to the observations made, both the petitions are dismissed with no order as to costs.

Sd/-

(R.K.Abichandani, J.)

Sd/-

(D.H.Waghela,J.)

(KMG Thilake)

15. At this stage, the learned senior Advocate Mr.Tanna prayed for stay of this order for three weeks. Having regard to the facts and circumstances, there is no justification for granting such prayer.

Sd/-

(R.K.Abichandani, J.)

Sd/-

(D.H.Waghela,J.)